UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF NEW YORK

IN RE:

BERNARD L. BUSH ELEANOR M. BUSH

CASE NO. 94-63379

Debtors Chapter 13

APPEARANCES:

WELDON-TRIMPER LAW FIRM, P.C. PAUL D. TRIMPER, ESQ.

Attorneys for Debtors Of Counsel

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ANTONUCCI & FINTEL, LLP EDWARD FINTEL, ESQ.

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Attorneys for Key Bank
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Syracuse, New York 13202

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Application for Final Compensation ("Final Application")

filed by Debtors' former attorneys, Antonucci & Fintel, LLP ("A&F") on March 24, 1997,

seeking fees of \$4,798.01 and reimbursement of expenses of \$234.63.¹ The Final Application covers the period June 17, 1994 through April 7, 1997.

The Final Application appeared on the Court's calendar at Utica, New York on April 29, 1997 and was opposed by the Debtors. The matter was submitted for decision on that date following completion of oral argument. Neither party requested an evidentiary hearing.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A).

FACTS AND ARGUMENTS

On December 12, 1994, the Debtors filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). At the time of the filing, Debtors were represented by A&F.²

Simultaneous with the petition, A&F filed a Disclosure of Compensation of Attorney for Debtor pursuant to Code § 329(a) and Federal Rule of Bankruptcy Procedure 2016(b) ("2016(b)

¹ While Notice of Hearing indicates the fee sought is \$4,798.01, the supporting affidavit and contemporaneous time records reflect a total fee of \$4,328.75.

² While the instant motion is one for approval of attorneys fees, the Debtors' opposition raises issues of alleged attorney malpractice and, thus, the Court finds it necessary to take judicial notice of the contents of the Debtors' case docket on file with the Clerk of this Court.

Statement"). The 2016(b) Statement indicated that A&F was to be paid a fee of \$1,000, of which \$200 had been paid pre-petition with a balance of \$800 still due.

Thereafter, Debtors filed a chapter 13 plan ("Plan") dated January 14, 1995. The Plan provided for dividend of 100% to unsecured creditors. In addition, the Plan provided that Key Bank of New York ("Key Bank"), a secured creditor, would be paid on a "Home Equity Line" outside the Plan. In addition, Key Bank was to received "the commercial location commonly known as Bush's Quick Stop located on Main Street in Croghan, New York in full satisfaction of debtors' commercial mortgage".

Thereafter, on November 7, 1995, this Court entered an Order confirming the Plan, however, in the interim and on or about March 22, 1995, Key Bank had filed a motion for relief from the automatic stay pursuant to Code § 362(d), seeking to foreclose its mortgage on the Debtors' residential real property on "William Street, Town of New Bremen, County of Lewis, State of New York." An evidentiary hearing on the motion was scheduled and re-scheduled. However, prior to the hearing, the Debtors withdrew their opposition to the motion, and on September 7, 1995, an Order granting the relief sought by Key Bank was entered. The Order was thereafter served on both A&F and the Debtors.

On February 25, 1997, the Debtors, no longer represented by A&F, filed a motion pursuant to Code § 1329 seeking to modify their confirmed chapter 13 plan to include the Key Bank mortgage encumbering their residence which was the subject of Key Bank's stay relief motion and this Court's September 7, 1995 Order. In their motion papers Debtors alleged that it was their belief that the Key Bank mortgage which was the subject of the September 7, 1995 Order covered only the Debtors' commercial property on Main Street in Croghan, New York, not

their residence on William Street. They asked the Court to permit them to modify their Plan to include the William Street mortgage in the Plan. The motion was apparently prompted by the institution of a state court foreclosure action against the William Street property by Key Bank, commenced on or about December 20, 1996. The motion was opposed by the Trustee, but was marked off the Court's calendar on the return date, March 4, 1997, for failure to serve the motion on Key Bank. The motion was thereafter refiled on March 17, 1996, and made returnable on April 22, 1997. Key Bank and the Trustee again opposed the motion and at the initial return date. It was thereafter adjourned to May 27, 1997 and then to June 24, 1997. By letter to the Court dated June 16, 1997, Debtors' current counsel, Weldon-Trimper Law Firm, P.C. withdrew the motion seeking to modify the Debtors' Plan, indicating that the Debtors had been able to pay off their chapter 13 Plan.³

A&F contends that prior to the termination of its representation of the Debtors, on or about March 13, 1997, it had been paid the total sum of \$1,270, of which \$160 represents the filing fee. A&F asserts that the additional fee of \$4,328.75 and additional expenses of \$234.63 being requested by the instant motion were directly related to services expended in connection with the "filing and involvement in extensive litigation regarding Parish Oil". *See* Affidavit of Attorney sworn to March 20, 1997, ¶ 3.

Debtors in opposing the Final Application contend that A&F is really seeking fees for "trying to fix or make up for things which had not been done at all in the first place or had not been done correctly and had to be redone." *See* Debtors' Opposition to Request for Counsel Fee

³ The Court notes that on May 9, 1997 it entered an Order Approving a Settlement of Debtors state court action against certain third parties for the sum of \$5,000.

by Antonucci & Fintel, LLP, sworn to April 9, 1997 at ¶ 4. They further contend that it was A&F who advised them to stop making payments on all of their debts post-petition, except the home equity line secured by their residence. They further contend that they were not aware of Key Bank's mortgage on their home, thinking that it only encumbered their commercial gas station property. When it became apparent that the mortgage also encumbered their home and Key Bank was seeking to lift the stay to foreclose, they sought direction from A&F and were assured that the foreclosure would be worked out and Key Bank would simply agree to take back the gas station property. Again, the Debtors allege that they were told not to make any payments to Key Bank.

Concerning their litigation in State Court versus Parish Energy Fuels, Inc. and Sun Oil Company, Debtors assert that A&F provided no representation and, in fact, ignored them during one court appearance that they did make in connection with Debtors' Special Counsel in the State Court action, Robert Miletsky, Esq.

Debtors finally assert that they have paid A&F a total of \$1,680.50 in connection with their chapter 13 case, both pre and post-petition.

In reply, A&F contend that Debtors allegations are "absolutely absurd". *See* Reply Affidavit of David P. Antonucci, Esq. sworn to April 25, 1997 at ¶ 3. A&F assert that the Debtors were well aware that the Key Bank mortgage blanketed both the gas station property and their home. They were also aware of a second mortgage on their residence securing a home equity line of credit. A&F argue that their initial plan for Debtors was to surrender the gas station property to Key Bank in full satisfaction of the blanket mortgage and have the Debtors keep current on the home equity mortgage. A&F posit that what they told Debtors with regard to

payment of the blanket mortgage was irrelevant because the Debtors could not afford to pay both mortgages. Finally, A&F assert that a settlement of the Debtors' state court law suit was essential to continued negotiations aimed at saving Debtors' residence and that A&F was terminated prior to receipt by Debtors of the settlement proceeds.

DISCUSSION

As this Court has noted previously:

It is important that debtors in bankruptcy have competent, qualified counsel, and it is equally important that counsel be fairly and reasonably compensated. In the vast majority of chapter 13 cases, this court therefor allows the fees request in full. But in a time when the bankruptcy system is generally perceived as serving the interests of bankruptcy professionals at the expense of the debtors and creditors the system was designed to serve, this court will not allow the fees of professionals to exceed reasonable limits. *In re Copeland*, 154 B.R. 693, 704 (Bankr. W.D.Mich. 1993) (Hon. Jo Ann C. Stevenson, Bankruptcy Judge).

Code § 330(a)(4)(B) provides a basis for the Court to award fees in a chapter 13 case to the debtor's attorney. The fee award should be based upon the benefit of the services to the debtor as well as the necessity of such services.

Code § 330(a)(3) imposes upon a bankruptcy court a duty to examine certain factors in order to fix a "reasonable" amount of compensation. The factors are set out in the statute and need not be repeated here.

From a review of the docket of this chapter 13 case, the Court concludes that it cannot be considered routine. It was plagued almost from its filing date with a motion by the Trustee

seeking dismissal, a motion by the major secured creditor, Key Bank, for relief from the stay, objections to the proposed chapter 13 plan from both the Trustee and Key Bank, simultaneous litigation in state court and, finally, substitution of bankruptcy counsel.

The initial fee as set forth in A&F's Rule 2016(b) Statement of \$1,000 does not appear to adequately and reasonably compensate any attorneys for the services subsequently rendered to the chapter 13 Debtors. The dispute, however, arises as to whether or not the representation provided by A&F directly lead to unnecessary litigation and, therefore, unnecessary legal services, as the Debtors contend.

The burden to establish the reasonableness of the fees is on A&F. *Hensley v. Eckerhart*, 461 U.S. 424, 437 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983) ("[F]ee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.") *See also In re Ostas*, 158 B.R. 312, 323 (N.D.N.Y. 1993); *In re Taylor* **(need date) 1995 WL 358206 at ¶ 2 (Bankr. D.Idaho), citing *In re Xebec* 147 B.R. 518, 524 (9th Cir. BAP 1992).

The Debtors accuse A&F of seeking fees for services that were necessitated by A&F's bad advice and failure to adequately represent Debtors in proceedings before this Court. Since no evidentiary hearing was requested by either party, the Court must rely upon the affidavits of the parties.

It is difficult for the Court to fully accept the Debtors' contention that they were unaware that the Key Bank mortgage encumbered only the gas station property and not their residence.⁴

⁴ See Exhibit B attached to Reply Affidavit of David P. Antonucci, Esq., sworn to April 25, 1997, which is a letter to Antonucci from the Debtors dated September 9, 1994, acknowledging that the Debtors used their home as collateral when they "purchased the store".

Nevertheless, it is not fully apparent to the Court why A&F allegedly counseled Debtors to stop making mortgage payments on the blanket mortgage while they attempted to negotiate a settlement with Key Bank which involved surrender of the gas station property in full satisfaction of that mortgage debt. A&F asserts that in spite of any such advice, the Debtors could not pay both the blanket mortgage and the home equity loan and while that may have been true over an extended period, payment at least on an interim basis would have possibly dissuaded Key Bank from filing a motion for relief from the stay some three months into the chapter 13 case. A&F contends that they could not have crafted a plan which provided for the curing the arrears on the blanket mortgage without incuring sanctions and that they so advised the Debtors.

Turning to that portion of A&F's Final Application which seeks fees for its participation in the state court proceeding for which Special Counsel had been appointed, the Debtors strenuously oppose any compensation in that regard. A review of the Final Application indicates that A&F seek compensation for some 11.9 hours or \$1,375 for services rendered in connection with the state court action. Included in that total are 5 hours devoted to the preparation of a brief and 1 additional hour involving a state court appearance. A&F contend that Debtors' Special Counsel requested the brief of bankruptcy issues as they related to the state court proceeding.

Upon review of the time entries related to the state court action, the Court believes that it should disallow the sum of \$1,000. To award any additional compensation would seem to burden the Debtors with duplicative fees. In addition, the Court notes a request of \$275 in connection with the preparation of the instant Final Application and \$262.50 devoted to opposition to the Trustee's motion to dismiss the case for failure of the Debtors to timely file a chapter 13 plan. Of that total request of \$537.50 the Court will disallow \$262.50. While the

Court generally compensates a professional for preparation of its fee application, the Court finds no basis for the fees incurred in connection with opposition to the Trustee's motion. No explanation is provided as to why Debtors plan was not filed until more than one month postpetition, thus, prompting the Trustee's motion to dismiss served on January 10, 1995.

The Court's review of the balance of the time entries submitted in support of the Final Application does not reveal any specific non-compensable time. Accordingly, the Court will approve a total fee as follows:

\$4.328.75

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<u>Less</u>		
Reduction in services render with state court action. Redu	uction in services	
rendered for preparation of fee application		1,000.00
Trustee's dismissal motion		262.50
Total Reduction		-1,262.50
	Net Fee	3,066.25
Less Credits ⁵	Fees Due	1,680.00 \$1,386.25

A&F also requests disbursements in the total sum of \$234.63 which the Court has reviewed and does not find objectionable.

Based upon all of the foregoing, it is

Fee requested:

ORDERED, that Debtors remain liable to A&F in the sum of \$1,386.25 for attorney fees

⁵ There appears to be a dispute as to the total amount of credits, A&F acknowledge payments totally \$1,270 while Debtors assert payment of \$1,680. It appears that A&F have not included all of the payments made by Debtors pre-petition.

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and \$234.63 in expenses, which sums shall be paid through the remaining months of the plan or

within 90 days of the date of entry of this Order if Debtors' Plan has been paid off as of the date

hereof.

Dated at Utica, New York

this 19th day of August 1997

STEPHEN D. GERLING

Chief U.S. Bankruptcy Judge